No. 82-10

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IN THE

Supreme Court of the United States

October Term, 1982

CINCINNATI MILACRON CHEMICALS, INC., ET AL.,
Petitioners,

—against—

EDWARD BLANKENSHIP, ET AL.,
Respondents,

MINSTER MACHINE COMPANY,
Petitioner,

—against—

VIRGINIA MAE KNITZ,
Respondent,

ST. VINCENT HOSPITAL & MEDICAL CENTER
and ELLA AMBATS,
Petitioners,

—against—

ADELINE T. ZAK and THADDEUS O. ZAK,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

REPLY BRIEF

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INTRODUCTION

Respondents obviously hope that enough accusations, color words and string citations (however wrong or irrelevant) will lead this Court to deny the Petition here and leave for another case and day the important questions presented.

Respondents' procedural "reasons" for denying the Petition are frivolous. Their substantive reasons, if adopted by written decision of this Court, would turn decades of constitutional adjudication on its head. Denial of the Petition for these reasons will work real and irreparable injustice and will let stand judicial misconduct that undermines the integrity of Ohio's judicial system.

We discuss respondents' arguments in the order presented in their brief ("Resp. Br.").

One: The Adequacy of the Record

On January 15, 1982—after the cases here were argued and while they were pending in the Ohio Supreme Court—the Ohio Chief Justice announced his candidacy for the Democratic Party nomination for Governor but refused to resign his judicial office. His January announcement was no mere testing of the waters. It was made to *end* "public speculation concerning [his] becoming a candidate". "I will be a candidate", the Chief Justice announced. "[T]his decision is right." (App. 161.)

Respondents want this Court to ignore the Chief Justice's press release because it is "unauthenticated", "never admitted into evidence" and accompanied by "no evidence of its release to the public". (Resp. Br. 2.)

These arguments are frivolous. The press release:

(a) was printed on the Chief Justice's official stationery;

(b) was confirmed by contemporaneous newspaper accounts as to which respondents make no objection (*see* App. 121-122);

(c) was submitted to the Ohio court as part of all three motions for rehearing; and

(d) was never challenged either by the Ohio court or by respondents below (despite their opportunity to do so in the *Milacron* case).

To ignore the Chief Justice's press release and what its issuance means for the impartiality and the integrity of the state's judicial process would be an outrage.

And the Chief Justice's campaign activities plainly did not stop with that release. He or his organization continued to solicit campaign funds and at the very least arranged the campaign dinner held on the night he finally resigned. But respondents want this Court to ignore these facts too: The "record is silent" on them we are told. The newspaper accounts that contain them are included "for emotional effect". (Resp. Br. 3, 7 n.6.) These arguments, too, are frivolous:

1. Respondents cannot question the truth of the facts contained in the news accounts and do not attempt to do so.

2. Respondents concede—as they must—that the newspaper accounts (App. 210-214) are properly before this Court at least with respect to petitioners in *St. Vincent* and *Minster Machine*. (Resp. Br. 3.) Under the circumstances, it makes no sense to ignore them with respect to the *Milacron* petitioners.

3. The newspaper accounts, from different papers, in different Ohio cities, are clearly relevant. They show that Chief Justice Celebrezze

—resigned from office to run for Governor as he announced he would in January;

—attended a campaign dinner on the night he resigned; and

—"did a complete about face in less than 24 hours" and withdrew from the campaign, reportedly for financial reasons. (App. 210-214.)

Respondents also want this Court to ignore the Chief Justice's handling of the motions for rehearing decided on March 9—the day he resigned. Respondents charge that petitioners' recital of those events is for "emotional effect" only, and accuse petitioners' counsel of improper conduct for attending the *ex parte* conference called by the Ohio court. (Resp. Br. 7.)

Petitioners did not seek or want that conference. They were ordered to be there by the Chief Justice personally and when they asked about having opposing counsel present, the Chief Justice said he did not want them there. When petitioners asked what the conference was about, he refused to tell them. The conference was most certainly improper, as respondents observe, but its impropriety cannot be blamed on petitioners.

Further, the circumstances of that conference are plainly relevant. They show at minimum, *one*, that the Chief Justice and the Ohio court took unprecedented steps to deny rehearing in *St. Vincent* and *Minster Machine* on the very day the Chief Justice was going to resign and attend a campaign dinner, and, *two*, that the Ohio court in fact considered the federal question raised on rehearing and gave no inkling of any state procedural infirmity with that claim.

Two: Ohio's Election Statute

Despite the Ohio Chief Justice's avowed candidacy and campaign activities, respondents argue that a constitutional challenge to his behavior must fail because he had not yet perfected his candidacy under the "specific requirements" of Ohio election law. (Resp. Br. 8-9.) Respondents' argument would allow a state judge to engage in the most extensive and egregious political campaigning, refrain until the last day from

filing as a candidate under applicable state election law, and be immune from federal constitutional challenge.

The short answer to this argument is: a state's labels do not control federal constitutional rights. *See, e.g., Bigelow v. Virginia*, 421 U.S. 809, 826 (1975); *In re Gault*, 387 U.S. 1, 49-50 (1967); *NAACP v. Button*, 371 U.S. 415, 429 (1963). The question here is not whether the Chief Justice perfected his candidacy under Ohio election law, but whether his position as candidate for Governor created an interest that was impermissibly at odds with the Constitution's requirement of fair and impartial judicial decisionmaking.

Three: Petitioners' Supposed "Waiver"

Respondents accuse petitioners of deliberately "bypass[ing] opportunities" to raise their federal claims, "await-[ing] the outcome" on the merits, and thereby waiving their federal rights. (Resp. Br. ii, 10.)

There was no thought or attempt to bypass any available state remedy or to await the outcome on the merits. Petitioners moved promptly, under the first procedures available to them.

The only remedy that respondents point to as being "bypassed" is the commencement of separate grievance proceedings against the Chief Justice. Yet respondents themselves acknowledge that that procedure is collateral in nature and could not protect petitioners' "rights in the pending litigation". (Resp. Br. 11.) Respondents nevertheless say now that petitioners should have devised their own procedures and applied to the "inherent power" of the Ohio court—on pain of waiving their federal rights. That would be an extravagant, draconian use of the waiver doctrine and one which has never been sanctioned by this Court.

The Ohio Chief Justice's participation in these cases while a candidate for Governor was appropriately raised in the first and only procedure available to petitioners: their rehearing

motions.[1] Moreover, the Ohio court clearly entertained those motions and the federal claims which were part of them. (*See* Pet. 10-12.) There is thus no basis for any charge of waiver. Petitioners' claims are properly before this Court.

Four: The Supposed Case-By-Case Rule of *Tumey* and its Progeny.

Respondents invite this Court to overrule a half century of constitutional law and hold—without written opinion—that a judge who is a political candidate must be presumed to be "impartial on the bench"—even a judge who accepts "a campaign contribution from an *amicus curiae*". (Resp. Br. 13, 16.) Respondents say that this Court has "avoided the creation of a *per se* rule" and "has chosen to rely on . . . a case-by-case basis". (*Id.* 13-14.)

This argument is a dangerous fiction. A "case-by-case basis" has not been the constitutional rule since *Tumey* and was explicitly rejected over dissent in *Ward v. Monroeville.* (409 U.S. at 62 (White, J., dissenting opinion).) In *Tumey,* this Court unanimously held that if a judge occupies a position which "would offer a possible temptation to the average man" or which is "practically and seriously inconsistent" with his judicial position, then due process of law is denied—irrespective of the particular judge's finances or the finances of his town or party or his supposed judicial consistency.[2] And it does not matter—contrary to respondents'

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[1] Respondents claim that Ohio's "procedure for rehearing does not specifically provide for raising the issue of disqualification. . . ." (Resp. Br. 12.) This is misleading: Rule IX of the Ohio Supreme Court restricts the subject matter for rehearing only as follows: "Such motion must be confined strictly to the grounds urged for rehearing and must not constitute a reargument of the case."

[2] Respondents try to show that the decisions below and the Chief Justice's votes are consistent with prior cases. (Resp. Br. at 4-5, 15, 16.) They plainly are not. *Compare* the Chief Justice's *Temple* opinion (50 Ohio St.2d at 323) *with* the *Minster Machine* majority (App. 69-70). Also *compare* the *St. Vincent* holding *with* the *Whitt* decision (64 Ohio St.2d at 358) where the court and Chief Justice

claim (Resp. Br. 17)—whether the judge is *certain* to benefit personally from a decision one way or another. This Court has never required such certainty. Indeed, in *Ward,* the judge received no direct personal benefit at all. What matters is that a judge may be tempted to rule for one side by the prospect of some gain or by the necessities of a practically and seriously inconsistent partisan position. Both these dangers are present here, as the Petition makes abundantly clear. (Pet. 15-20.) To ignore them is to ignore the realities of political campaigning, the collective judgment of virtually every state in the union and this Court's holding in *Tumey:* one cannot be a political incumbent or candidate and at the same time be an impartial judge.[3]

Respondents' fallback position is equally untenable. They argue that even if the Ohio Chief Justice's position as candidate rendered him unfit to sit as judge, he was nonetheless only one justice on "a collegial court of seven .... No single justice has the power to govern the outcome". (Resp. Br. 17.)

This factor has never mattered in law. A litigant is entitled to unbiased judges even if their actions are not controlling and even if, as was the case in *Ward,* the litigant has the right to a full *de novo* trial before an unbiased judge. (409 U.S. at 61-62.) Here, given the collegial nature of the Ohio Supreme Court, it cannot be said that the Chief Justice's participation had no effect on the ultimate decision. His participation tainted the court's entire decisionmaking, not merely his vote.

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explicitly included hospitals within the contested statute of limitations. Respondents make no effort to show the *Milacron* decision is consistent with prior law.

[3] Respondents suggest that this view proves too much, because *judicial* campaigns by judges are subject to the same objections. (Resp. Br. 16.) Perhaps that is true as a theoretical matter. But Ohio and virtually every other state with an elected judiciary has been capable of making the distinction and has imposed severe restrictions on judicial campaigning in an effort to eliminate dangers of unfairness. (*See* Pet. 5, 8 n.5.)

Five: Respondent's Concluding Arguments.

Respondents make a cluster of arguments at the end of their brief:

1. They argue that if this Court grants the writ and reverses, it will be forced to "imply a remedy which is not apparent on the face of [Ohio's] Code". (Resp. Br. 18.)

This argument makes no sense. Petitioners are not asking this Court to "imply" any unique remedy: On remand, petitioners would simply be entitled to a rehearing on the merits of their state law claims without the participation of the judge whose conduct was the subject of attack for constitutional unfairness. *See, e.g., Taylor v. Hayes,* 418 U.S. 488, 501 (1974). The Ohio court could then sit either with the remaining judges or with additional judges designated for that purpose under the Ohio Constitution, Art. IV, § 2.

2. Respondents stress the "enormity of the consequences" if this Court were to grant the writ and reverse. Over 90 cases "would be called into question", respondents say, and therefore, this Court should "look elsewhere for a remedy". (Resp. Br. 18-19.)

But there is no other remedy. This Court has none available to it and neither do petitioners. To be sure, if this Court reverses, *some* cases will have to be reheard (precisely how many is uncertain), yet that result will have been caused by the conduct of the Ohio Chief Justice and his court. It is no "reason" to deny the writ.

3. Finally, respondents argue that petitioners have shown no suspect classification or any "absolute deprivation of some important interest". (Resp. Br. 20.)

This argument is without substance. *First,* petitioners have shown that they were irrationally singled out. (Pet. 21-23.) *Second,* petitioners have shown that they were deprived finally and without recourse of their state-created right (apart from their federal right) to be heard by judges who are not partisan political candidates. That right is an important one, at the very

"core of due process". *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring). Thus, petitioners' equal protection claim is as clear and compelling as their claim to denial of due process.

CONCLUSION

Over 50 years ago this Court held in *Tumey* that when a judge faces a possible temptation "not to hold the balance nice, clear and true" or when a judge holds a partisan position that is "practically and seriously inconsistent" with his judicial responsibilities, a litigant is necessarily deprived of due process of law.

If *Tumey* is still the law, then petitioners are entitled to the writ here. Chief Justice Celebrezze chose to become a candidate for Governor. He campaigned, changed court practice and deadlines for his campaign needs and decided politically volatile cases involving active campaign contributors as *amici*. His conduct and the conduct of the Ohio court deprived petitioners of their right to a hearing before a fair and impartial tribunal.

For these reasons, as set out above and in the Petition, petitioners ask that the writ be granted and that the judgments below be reversed.

Respectfully submitted,

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